

## **EXHIBIT I**

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

In re: )  
 ) No. 02 B 02474  
KMART CORPORATION, ET AL., )  
 ) Chicago, Illinois  
 ) September 29, 2004  
Debtors. ) 2:00 p.m.

EXCERPT (A) OF PROCEEDINGS BEFORE THE  
HONORABLE SUSAN PIERSON SONDERBY

APPEARANCES:

MR. WILLIAM BARRETT  
MR. DAVID GORDON  
on behalf of Kmart Corporation;

MR. ROBERT VORT (TELEPHONICALLY)  
on behalf of David Rots;

MR. JEFFREY DAN  
on behalf of Gator;

MR. MICHAEL EIDELMAN  
on behalf of the Jankowskis;

MR. LAURENCE ABLE  
on behalf of Marie Rivera;

MR. ALAN FARNELL  
on behalf of Dawn Hawkins.

\* \* \* \* \*

1  
2 THE COURT: All right. I will read my oral  
3 ruling into the record.

4 This matter comes before the court on  
5 the motion of Harvard -- strike that, on the motion  
6 of Kmart for preliminary injunction. Kmart seeks to  
7 preliminarily enjoin Harvard Real Estate-Allston,  
8 Inc., a landlord, quote, "from evicting Kmart based  
9 upon defaults alleged or that could have been  
10 alleged in Harvard's pre-confirmation objection to  
11 Kmart's assumption of its lease and from violating  
12 the discharge injunction and confirmation order,"  
13 end of quote.

14 Harvard leases a store located in  
15 Brighton, Massachusetts, to Kmart under a certain  
16 lease dated January 26th, 1978. Section 2(B) of the  
17 lease provides the tenant -- strike that.  
18 Section 2(B) of the lease prohibits the tenant from  
19 operating inter alia a grocery, meat, produce, milk,  
20 or bakery department in the store.

21 Kmart currently devotes approximately  
22 10 percent of the total 80,000 square footage of the  
23 store to the sale of certain food items. The items  
24 are displayed on four, 60-foot-long shelving units  
25 at the center rear of the store.

1                   On January 22nd, 2002, Kmart and 37  
2 affiliates filed voluntary petitions for  
3 reorganization under Chapter 11. On February 26th,  
4 2003, the debtors filed the first amended joint plan  
5 of reorganization.

6                   On March 28th, 2003, Kmart notified  
7 Harvard that it intended to seek authority to assume  
8 the lease pursuant to Section 365 of the Bankruptcy  
9 Code as part of its plan. On April 4th, 2003,  
10 Harvard filed an objection to the plan, arguing that  
11 the lease could not be assumed because Kmart was in  
12 default for failure to pay certain CAM charges, real  
13 estate taxes and work orders. Harvard alternatively  
14 argued that Kmart's prepetition exercise of an  
15 option to extend the lease was ineffective because  
16 there were unpaid monetary defaults at the time.  
17 According to Harvard, the failed attempt to extend  
18 the lease resulted in its termination prior to the  
19 petition date. As such, there was nothing for  
20 Kmart, as debtor-in-possession, to assume.

21                   The parties agreed to treat the  
22 assumption objection separate from the plan  
23 confirmation process. On April 23rd, 2003, this  
24 court entered an order confirming the plan. The  
25 effective date of the plan was May 6th, 2003. The

1 parties commenced discovery relating to the  
2 assumption objection in July of 2003.

3 Kmart filed a response to the  
4 assumption objection and Harvard filed a reply,  
5 adding its argument that the ongoing violation of  
6 the lease's prohibition against selling groceries  
7 precluded Kmart's assumption of the lease. The  
8 court thereafter scheduled an evidentiary hearing on  
9 the assumption objection for March 18th and 19th,  
10 2004.

11 On January 29th, 2004, Harvard filed a  
12 document with the court entitled, quote, "Withdrawal  
13 of assumption objection," end of quote. On  
14 February 5th, 2004, Kmart filed a motion to dismiss  
15 the assumption objection with prejudice.

16 At that hearing, the parties advised  
17 that they had reached an agreement. The court  
18 directed the parties to submit a proposed draft  
19 order. On April 2nd, 2004, the court entered the  
20 agreed order they submitted, which provided, in  
21 part, quote, "(i), the motion to dismiss is granted  
22 as set forth herein, (ii) the objection is dismissed  
23 with prejudice as of the effective date of Kmart's  
24 joint plan of reorganization, May 6th, 2003, and  
25 (iii) Kmart is deemed to have assumed the lease as

1 of the effective date," end of quote. The court  
2 will refer to that order as the "assumption order."

3 On April 23rd, 2004, less than a month  
4 after the entry of the assumption order, Harvard  
5 issued a, quote, "notice to vacate, slash, notice of  
6 termination," end of quote, to Kmart. The notice  
7 states, inter alia, that Kmart was in default due to  
8 its continuing sale of grocery items. Harvard  
9 advised that if Kmart did not voluntarily vacate the  
10 store within 30 days of receipt of the notice,  
11 Harvard would commence state court eviction  
12 proceedings.

13 On May 5th, 2004, Kmart filed this  
14 adversary complaint. In Count I, Kmart seeks the  
15 entry of an order declaring that Harvard is, quote,  
16 "precluded from attempting, on the basis of defaults  
17 that were or could have been raised in the  
18 assumption objection and that were resolved by the  
19 order dismissing the assumption objection and the  
20 confirmation order, to terminate the lease or to  
21 evict Kmart," end of quote.

22 In Count II Kmart seeks a declaration  
23 that Harvard, quote, "has no further right in this  
24 or any other court to assert defaults alleged in the  
25 course of the assumption objection that were known

1 or should have been known when Kmart gave notice  
2 that it would assume the lease subject only to those  
3 monetary claims asserted in Harvard's cure claim and  
4 a ruling that Harvard's notice of default and the  
5 commencement of any eviction proceeding based  
6 thereon constitute a violation of the discharge  
7 injunction contained in the confirmation order," end  
8 of quote.

9 Kmart alleges in the complaint that  
10 this court has subject matter jurisdiction over the  
11 entire proceeding. Although Harvard denies that  
12 allegation in its answer, the parties did not  
13 further address the issue of jurisdiction. The  
14 court must nonetheless determine as a threshold  
15 matter whether it has subject matter jurisdiction  
16 over this proceeding. See *In re Federated*  
17 *Department Stores, Inc.*, 240 B.R. 711.

18 Subject matter jurisdiction is  
19 generally defined as, quote, "the court's authority  
20 to hear a given type of case," end of quote, citing  
21 *U.S. v. Morton*, 104 Supreme Court 2769. Quote, "The  
22 jurisdiction of bankruptcy courts, like that of  
23 other federal courts, is grounded in, and limited  
24 by, statute," end of quote, citing *Celotex Corp.*  
25 *versus Edwards*, 514 U.S. 300. Section 1334(b) of

1 Title 28 of the United States Code is the source of  
2 bankruptcy court jurisdiction, giving district  
3 courts original but not exclusive jurisdiction over  
4 all civil proceedings arising under Title 11 or  
5 arising in or related to cases under Title 11. Id.  
6 The district courts may, as they have in this  
7 district, refer those proceedings to bankruptcy  
8 judges. Id.

9 In Celotex, the Supreme Court agreed  
10 with the view that, quote, "Congress intended to  
11 grant comprehensive jurisdiction to the bankruptcy  
12 courts so that they might deal efficiently and  
13 expeditiously with all matters connected with the  
14 bankruptcy estate," end of quote. Id. at 308  
15 quoting Pacor Inc. versus Higgins, 343 (sic) F.2d  
16 984. Quote, "related to," end of quote,  
17 jurisdiction, encompasses more than proceedings  
18 involving the property of the debtor or the estate.  
19 Id. Such jurisdiction, however, is not boundless.  
20 Id. In the Seventh Circuit, related to jurisdiction  
21 is limited to dispute whose resolution, quote,  
22 "affects the amount of property available for  
23 distribution or the allocation of property among  
24 creditors," end of quote, citing Home Insurance  
25 Company versus Cooper & Cooper, Limited, 889 F.2d



1 746.

2 Bankruptcy subject matter jurisdiction  
3 is sharply reduced following confirmation of a  
4 Chapter 11 plan, citing *In re Spiers Graff Spiers*,  
5 190 B.R. 1001, citing *Pettibone Corp. versus Easley*,  
6 935 F.2d 120. The Seventh Circuit in *Zerand-Bernal*  
7 *Group, Inc., versus Cox* observed that while the  
8 language of Section 1334(b) is broad enough to  
9 encompass matters such as the post-confirmation  
10 injunction sought in that case, the section should  
11 not be read so broadly, 23 F.3d 159. Rather, it  
12 should be construed in light of the purposes of its  
13 enactment. *Id.* The purpose of a bankruptcy  
14 reorganization that is dealing efficiently and  
15 expeditiously with all matters connected with the  
16 bankruptcy estate is certainly diminished after  
17 confirmation. See *In re Cary Metal Products, Inc.*,  
18 152 B.R. 927. Indeed, the Seventh Circuit has  
19 repeatedly observed that the confirmed debtor must  
20 come out from under bankruptcy court tutelage and  
21 therefore, quote, "may not come running to the  
22 bankruptcy judge every time something unpleasant  
23 happens," end of quote, citing *Pettibone*, 935 F.2d  
24 at 122. Simply put, bankruptcy does not last  
25 forever. See *Id.* at 120.

1                   However, quote, "whether emanating  
2 from the general power of courts to enforce their  
3 decrees or from specific bankruptcy code sections,  
4 there exists a residue, albeit limited, of  
5 bankruptcy court authority over a confirmed plan  
6 Chapter 11 case," end of quote, citing In re Kewanee  
7 Boiler Corp., 198 B.R. 519.

8                   There are a number of possible sources  
9 for this residual authority, see Id. First Section  
10 105 of the Code empowers bankruptcy judges, quote,  
11 "to issue any order, process, or judgment that is  
12 necessary or appropriate to carry out the  
13 provisions," end of quote, of the Code and to sua  
14 sponte take any action or make any determination,  
15 quote, "necessary or appropriate to enforce or  
16 implement court orders or rules or to prevent an  
17 abuse of process," end of quote. 11 U.S.C. Section  
18 105(a).

19                   Importantly, Section 105 is an aid to  
20 jurisdiction, not a source of jurisdiction, citing  
21 In re Sybaris Clubs International, Inc., 189 B.R.  
22 152. Moreover, the Section 105 power, quote, "must  
23 and can only be exercised within the confines of the  
24 Bankruptcy Code," end of quote, citing Norwest Bank  
25 Worthington versus Ahlers, 485 U.S. 197.

1 Another possible source of statutory  
2 power that may survive confirmation is found at  
3 Section 1142(b) of the Code. That section empowers  
4 a court inter alia to direct the debtor and any  
5 other necessary party to reform acts, quote,  
6 "necessary for the consummation of the plan," end of  
7 quote.

8 Yet another source of power is found  
9 at Federal Bankruptcy Rule 3020(d), which provides,  
10 quote, "Notwithstanding the entry of the order of  
11 confirmation, the court may issue any other --"  
12 strike that, "any order necessary to administer the  
13 estate," end of quote.

14 After confirmation of the plan,  
15 bankruptcy judges usually only invoke the powers  
16 given to them, whether under Sections 105 or 1142(b)  
17 or Bankruptcy Rule 3020(d) to, quote, "ensure that  
18 reorganization plans are implemented and to protect  
19 estate assets devoted to implement the confirmed  
20 plan," end of quote, citing In re Schwinn Bicycle  
21 Company, 210 B.R. 747. Indeed, a bankruptcy judge's  
22 powers are limited to take only those actions that  
23 aid its jurisdiction, which, as noted before, is  
24 sharply reduced post-confirmation. See Kewanee, 270  
25 B.R. 912, which holds that, quote, "bankruptcy

1 judges are not ombudsmen licensed to adjudicate  
2 every post-confirmation problem affecting a debtor  
3 or its creditors. They can only decide matters  
4 after confirmation within their more narrow  
5 jurisdiction," end of quote, and Cunningham versus  
6 Pension Benefit Guarantee Corp., 235 B.R. 609, that  
7 held, quote, "Section 105 is only meaningful to the  
8 extent that the matter arises under core or related  
9 jurisdiction," end of quote.

10 One final point about bankruptcy court  
11 jurisdiction and bankruptcy court power. The  
12 Seventh Circuit has held that, quote, "discharge  
13 brings into existence a perpetual injunction, making  
14 the bankruptcy proceeding a continuous, ongoing  
15 proceeding as to anyone bound by the injunction,"  
16 end of quote, citing matter of Hendrix, 986 F.2d  
17 195. Therefore, a bankruptcy court has jurisdiction  
18 over post-confirmation matters concerning  
19 modification of the discharge injunction, id., or  
20 violation of the discharge injunction, citing  
21 Kewanee Boiler, 270 B.R. at 921.

22 In this matter, this court's  
23 jurisdiction over Count I, which seeks a declaration  
24 concerning the res judicata effect of the assumption  
25 order, is questionable at best. For one thing,

1 Kmart, who has the burden, has not demonstrated that  
2 this court's determination of the preclusive effect  
3 of the assumption order would affect the amount of  
4 property available for distribution or the  
5 allocation of property among creditors. Even if one  
6 of those effects was demonstrated, there remains the  
7 question of whether the court would invoke the power  
8 to interpret the preclusive effect of the assumption  
9 order given that such an analysis hardly appears  
10 necessary to ensure the implementation of the plan  
11 or to protect an estate asset devoted to the plan.

12 Moreover, as pointed out by the  
13 Seventh Circuit in *Pettibone*, the res judicata  
14 effect of an order entered in the first case is  
15 usually for the judge presiding in the second case  
16 to decide, citing *Pettibone* 935 F.2d at 123.  
17 Reorganized Kmart is certainly free to raise res  
18 judicata as a defense in the state court. After  
19 confirmation, the reorganized firm is like any other  
20 business that protects its interests by pleading  
21 appropriate defenses to actions, *Id.*

22 While jurisdiction over Count I is  
23 therefore doubtful, jurisdiction over Count II,  
24 which concerns the possible violation of the plan  
25 discharge injunction, is fairly clear. Finding

1 jurisdiction over at least one of the counts, the  
2 court will therefore proceed to address the motion  
3 seeking preliminary injunctive relief.

4 In the motion's prayer for relief,  
5 Kmart asks the court to, quote, "preliminarily  
6 enjoin Harvard from evicting Kmart based upon  
7 defaults alleged or that could have been alleged in  
8 the assumption objection and from violating the  
9 discharge injunction and the confirmation order,"  
10 end of quote. That request essentially raises two  
11 alternative grounds for injunctive relief.

12 The request for a preliminary  
13 injunction to enforce a discharge injunction, which  
14 may be more appropriately considered as a motion to  
15 hold Harvard in contempt for violating the discharge  
16 injunction, was not developed after the perfunctory  
17 reference in the motion's prayer for relief. For  
18 example, the request was not discussed at the  
19 hearing or in the post-trial briefs. Accordingly,  
20 the court will not consider it, see United States  
21 versus Lanzotti, 205 F.3d 951 and Head Start Family  
22 Education Program, Inc., versus Cooperative  
23 Educational Service, 46 F.3d 629.

24 The second ground for preliminary  
25 injunctive relief is based on principles of res

1   judicata. Specifically, Kmart is asking for a  
2   preliminary injunction to prevent Harvard from using  
3   the defaults that were purportedly resolved by the  
4   assumption order as a predicate for an eviction  
5   proceeding or for termination of the lease.

6               The Seventh Circuit has noted, and  
7   Kmart correctly contends, that a request for an  
8   injunction meant to protect the court's jurisdiction  
9   does not require proof of all four, quote,  
10  "traditional," end of quote, injunctive relief  
11  factors, citing Fisher versus Apostolou, 155 F.3d  
12  876. The movant need only demonstrate likelihood of  
13  success on the merits and lack of harm to the public  
14  interest. Id. See also Klay versus United  
15  Healthgroup, Inc., 376 F.3d 1092, distinguishing  
16  between traditional, statutory and all-writs types  
17  of injunction relief.

18              What Kmart seeks here is an  
19  injunction, quote, "to protect the effectiveness of  
20  this court's orders," end of quote, see Kmart's  
21  proposed findings and conclusions at page 8. Kmart  
22  prefers to have this court rule on the preclusive  
23  effect of the assumption order rather than allowing  
24  the issue to be adjudicated through the ordinary  
25  methods of defensive pleading in the context of an

1 affirmative res judicata defense in state court. As  
2 previously noted, however, the Seventh Circuit has  
3 stated that, quote, "disputes about the effect of a  
4 decision in one case on the prosecution of another  
5 are for the judge presiding in the second case. In  
6 the law of preclusion, the second court normally  
7 determines the effects of the first judge's order,"  
8 end of quote, citing Pettibone 935 F.2d at 123.

9           It is true that an injunction to  
10 protect the preclusive effect of an order may, in  
11 certain instances, be warranted. Quote, "Res  
12 judicata injunctions are most easily justified to  
13 protect against a clear demonstration that  
14 vexatious, multiplicitous, and harassing litigation  
15 of the same claim has not been deterred effectively  
16 by ordinary methods of defensive pleading," end of  
17 quote, citing Wright, Miller & Cooper, Federal  
18 Practice and Procedure, Jurisdiction 2nd,  
19 paragraph -- strike that, Section 4405.

20           An injunction to protect the  
21 preclusive effect of an order may also be justified  
22 where, quote, "the particularly tangled nature of  
23 the controversy will require the second court to  
24 invest great effort in becoming sufficiently  
25 familiar with the underlying dispute to make an



1 intelligent preclusion ruling," end of quote. Id.

2 Again, while under those circumstances  
3 an injunction based on res judicata may be  
4 appropriate, it is ordinarily to be avoid because  
5 the, quote, "first court should not lightly usurp  
6 the jurisdiction of a second court to dispose a  
7 pending litigation," end of quote. Id.

8 Here, there is no evidence of  
9 vexatious, multiplicitous or harassing litigation of  
10 the same claims. Indeed, Harvard has not even filed  
11 a lawsuit in state court. Moreover, the factual and  
12 procedural history leading to entry of the  
13 assumption order is relatively straightforward and  
14 will not cause significant duplication of effort  
15 should the dispute eventually reach a state court  
16 judge.

17 For all of these reasons, Kmart's  
18 request for a preliminary injunction is denied.

19 Counsel for Harvard, would you give me  
20 a minute order, please, for reasons cited on the  
21 record, entering the relief entered.

22 All right. We need a status then on  
23 the complaint.

24 MR. BARRETT: I would suggest  
25 December 14th.

1 THE COURT: December 14th it is, 10:00 a.m.

2 Anything else?

3 MR. BARRETT: Nothing else today. Thank

4 you.

5 (End of excerpt (A) had in the  
6 above-entitled cause, September  
7 29, 2004.)

8 I, GARY SCHNEIDER, CSR, RPR, DO HEREBY CERTIFY THAT  
9 THE FOREGOING IS A TRUE AND ACCURATE EXCERPT (A) OF  
10 PROCEEDINGS HAD IN THE ABOVE-ENTITLED CAUSE.

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